

COPY

1 TONY WEST
2 Assistant Attorney General
3 VINCENT M. GARVEY
4 Deputy Branch Director
5 ERIC J. BEANE (AZ Bar No. 23092)
6 Trial Attorney
Civil Division – Federal Programs Branch
U.S. Department of Justice
P.O. Box 883 – Room 7124
Washington, D.C. 20530
Telephone: (202) 616-2035/Facsimile: (202) 616-8470
Eric.Beane@usdoj.gov

Attorneys for the United States

2011 FEB 24 PM 4:15

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT CALIF.
LOS ANGELES

卷之三

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

KHALED AL HASSEN

Plaintiff,

v.

SHEIKH KHALIFA BIN ZAYED AL NAHYAN,
an individual; SHEIKH MOHAMED BIN
ZAYED AL NAHYAN, an individual;
GENERAL SAEED HILAL ABDULLAH AL
DARMAKI, an individual; and DOES 1 to 10,
inclusive.

Defendants.¹

Case Number:
2:09-CV-1106-DMG
(FMOx)

{ Statement of Interest

} Thursday,
February 24, 2011

¹The United States is not a party to this action but seeks to file this Statement of Interest in order to explain to the Court why the Vienna Convention on Diplomatic Relations renders unlawful and ineffective the attempted service of process on Defendant Sheikh Mohamed Bin Zayed Al Nahyan through service on accredited diplomatic agents of the UAE.

**STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA**

INTRODUCTION

At the direction of the Attorney General of the United States, pursuant to 28 U.S.C. § 517,² the undersigned attorney of the United States Department of Justice, respectfully informs this Honorable Court of the interest of the United States in the pending lawsuit against His Highness Sheikh Mohamed Bin Zayed Al Nahyan (“Sheikh Mohamed”), the Crown Prince of Abu Dhabi, chairman of the Abu Dhabi Executive Council, and Deputy Supreme Commander of the United Arab Emirates (“UAE”) Armed Forces. The United States respectfully notifies the Court that Sheikh Mohamed has not been lawfully served in this matter because both UAE Ambassador Yousef Al Otaiba and UAE Military Attaché Waleed Al Shamsi, through whom this Court permitted Plaintiffs to serve Defendant Sheikh Mohamed, are diplomatic agents and not subject to the jurisdiction of U.S. courts, including service of process, pursuant to the Vienna Convention on Diplomatic Relations (“Vienna Convention”). In support of its interest, the United States sets forth as follows:

BACKGROUND

1. On January 25, 2010, Plaintiff filed a motion requesting an order from the Court that would permit service of process by alternative methods under Rule 4(f)(3). Doc. #11. In support of his motion, Plaintiff proffered evidence that he had previously attempted service on Defendants by hiring a process service company that had successfully served process within the UAE in the past.

² 28 U.S.C. § 517 provides that “any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States. . . .”

1 *Id.* Plaintiff claimed that the company's process server was unsuccessful in this
2 case, however, because UAE Government agents allegedly detained the process
3 server and prevented him from serving a government official. *Id.* The Court
4 granted Plaintiff's motion and permitted Plaintiff to serve Defendants Sheikh
5 Khalifa and Sheikh Mohamed "by either (a) personally delivering a copy of the
6 summons and complaint to either the United Arab Emirates ambassador or
7 military attaché to the United States; or (b) sending a copy of the summons and
8 complaint by certified mail to either the ambassador or the military attaché."

9 Doc. #19, at 7.

10 2. Plaintiff contends that service on Sheikh Mohamed was lawfully
11 completed by sending a copy of the Summons and Complaint via certified mail to
12 UAE Ambassador Yousef Al Otaiba and UAE Military Attaché Waleed Al
13 Shamsi. Doc. #41 (Decl. of Robert D. Goldberg), at ¶¶ 3-6. Defendants
14 challenged service, arguing that service was defective "because Plaintiff did not
15 establish that the Court could exercise personal jurisdiction over Defendants, a
16 prerequisite to proper service under Rule 4(f)(3)." Defs.' Mem. at 19, Doc. #28.
17 The Court rejected this argument, finding that "Plaintiff has established this
18 Court's personal jurisdiction over Defendants. . . . Defendants were properly
19 served under Rule 4(f)(3) and have actual notice of this lawsuit. Due process
20 requires nothing more." Doc. #53, at 24. Defendants also argued that service
21 was ineffective under Rule 4(f)(2) because it did not comport with UAE law, but
22 the Court ruled that "this argument misses its mark insofar as Plaintiff did not
23 serve Defendants under Rule 4(f)(2) and the legality of service under foreign law
24 is immaterial to service under Rule 4(f)(3)." *Id.* at 24 n.10.

25 3. Rule 4(f)(3) provides that individuals in a foreign country may be
26 served "by other means not prohibited by international agreement, as the court
27
28

1 orders.” Fed. R. Civ. P. 4(f)(3). For service under Rule 4(f)(3) to be proper it
2 must be (1) directed by the court and (2) not prohibited by international
3 agreement. *See, e.g., Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007,
4 1014 (9th Cir. 2002). Although Plaintiff served Defendant Sheikh Mohamed in a
5 manner approved by the Court, that method of service, as explained below, was a
6 means that was prohibited by an international agreement.

7 **DISCUSSION**

8 4. Service of process on the UAE Ambassador and the military attaché
9 was inconsistent with the Vienna Convention, a binding treaty of the United
10 States. The Vienna Convention on Diplomatic Relations, which was opened for
11 signature on April 18, 1961, and ratified by the United States on November 8,
12 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95, specifies the privileges and immunities
13 that the President, with the advice and consent of the Senate, has agreed to afford
14 diplomatic envoys like those served in this case. Both the UAE Ambassador,
15 Yousef Al Otaiba, and the UAE Military Attaché, Waleed Al Shamsi, are
16 diplomatic agents covered by the Vienna Convention. *See* Letter from U.S.
17 Department of State to U.S. Department of Justice (copy attached as Exhibit 1).

18 5. The Vienna Convention provides diplomatic envoys with broad
19 immunity from the civil jurisdiction of United States courts, subject to three
20 limited exceptions that are not relevant to this case. Art. 31(1). In addition,
21 Article 29 of the Vienna Convention provides:

22 The person of a diplomatic agent shall be inviolable. He shall not be
23 liable to any form of arrest or detention. The receiving State shall
24 treat him with due respect and shall take all appropriate steps to
25 prevent any attack on his person, freedom or dignity.

26 Art. 29. The treaty term “inviolable” is “advisedly categorical” and “strong,” and
27 the Vienna Convention “makes no provision for exceptions other than those set
28

1 forth in Article 31.” *767 Third Avenue Assocs. v. Permanent Mission of the*
2 *Republic of Zaire*, 988 F.2d 295, 298 (2d Cir. 1993).

3 6. Article 29 is understood to impose a “positive duty” on receiving
4 states “to protect inviolable . . . persons . . . from physical invasion or interference
5 with their functioning and impairment of their dignity.” Eileen Denza,
6 *Diplomatic Law* 112 (2d ed. 1998). As noted by a leading treatise, personal
7 inviolability is considered the core diplomatic immunity:

8 Personal inviolability is of all the privileges and immunities of
9 missions and diplomats the oldest established and the most
10 universally recognized. . . . The inviolability of ambassadors is
11 clearly established in the earliest European writings on diplomatic
law and from the sixteenth century until the present one can find
virtually no instances where a breach of a diplomat’s inviolability
was authorised or condoned by the Government which received him.

12 *Satow’s Guide to Diplomatic Practice* 120 (Lord Gore-Booth ed., Longman 5th
13 ed. 1979); see also B. Sen, *A Diplomat’s Handbook of International Law &*
14 *Practice* 107 (3d ed. 1988) (noting that it is “essential to ensure inviolability of
15 the person of the ambassador in order to allow him to perform his functions
16 without hindrance from the government of the receiving state, its officials and
17 even private persons”).

18 7. The United States consistently has taken the position that a foreign
19 official with diplomatic inviolability cannot be used as an involuntary service
20 agent. See, e.g., *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), cert.
21 denied 126 S. Ct. 2020 (2006); *Ye v. Zemin*, 383 F.3d 620, 629-30 (7th Cir.
22 2004). The Executive Branch interprets Articles 29 and 31 of the Vienna
23 Convention as prohibiting the service of process on Defendant Sheikh Mohamed
24 through the UAE Ambassador, Yousef Al Otaiba, or the UAE Military Attaché,
25 Waleed Al Shamsi. See Ex. 1. “It is well settled that the Executive Branch’s
26 interpretation of a treaty ‘is entitled to great weight.’” *Abbott v. Abbott*, 130 S.
27
28

1 Ct. 1983, 1993 (2010) (citation omitted); *see also Kolovrat v. Oregon*, 366 U.S.
2 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning
3 given them by the departments of government particularly charged with their
4 negotiation and enforcement is given great weight.”); *Sumitomo Shoji America,*
5 *Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (where parties to treaty agree on
6 meaning of treaty provision, and interpretation “follows from the clear treaty
7 language[, the court] must, absent extraordinarily strong contrary evidence, defer
8 to that interpretation”).

9 8. Moreover, because the matter at issue here directly involves the
10 immunity of diplomatic officers of a foreign state, the Court should afford
11 deference to the Executive’s views. Article II, Section 3 of the Constitution
12 assigns to the President the authority to “receive Ambassadors and other public
13 Ministers.” The very wording of Article II, Section 3 strongly suggests—if not
14 explicitly provides—that the Executive Branch has constitutional authority to
15 define the terms by which the President receives foreign emissaries. *Cf. Banco*
16 *Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964) (noting “serious and
17 far-reaching consequences [that] would flow from a judicial finding that
18 international law standards had been met if that determination flew in the face of
19 a State Department proclamation to the contrary”).

20 9. The United States Court of Appeals for the D.C. Circuit has
21 underscored the need for judicial deference to the Executive Branch on precisely
22 the question here—whether permitting service of process on diplomatic agents
23 would interfere with “the purposes of diplomatic immunity” in a given case. *See*
24 *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980-81 (D.C. Cir. 1965). In
25 *Hellenic Lines*, the plaintiff filed an action against the Republic of Tunisia and
26 attempted to compel the United States Marshal to serve on the Tunisian

1 Ambassador a summons addressed to the Republic. *Id.* at 929. In connection
2 with the appeal, the Department of State submitted its view that service on the
3 ambassador “would prejudice the United States foreign relations and would
4 probably impair the performance of diplomatic functions” in several ways. *Id.* at
5 980 & n.5. The court squarely held that service on an immune diplomat was
6 impermissible and must be quashed, in light of the Executive Branch’s advice to
7 the court. *Id.* at 980-81 & n.5-6.

8 10. More recently, the Second Circuit concluded that the “inviolability”
9 provision in Article 29 of the Vienna Convention precludes service of process on
10 persons entitled to diplomatic immunity even where such persons are served on
11 behalf of a non-immune, private entity. *See Tachiona*, 386 F.3d at 221-24
12 (“Article 29 of the Vienna Convention . . . protected Mugabe and Mudenge from
13 service of process as agents for ZANU-PF. Therefore, ZANU-PF was not
14 properly served, and the claims against it should have been dismissed.”). Other
15 courts also have recognized the personal inviolability of diplomatic agents and
16 found that service of process was unlawful in a variety of similar circumstances.
17 *See, e.g., Ye*, 383 F.3d at 629-30 (holding that head-of-state immunity precluded
18 use of a foreign head of state as an involuntary agent for service on a third party
19 and deferring to Executive Branch determination that service of process on a
20 foreign head of state “in order to reach an intended co-defendant in the same suit
21 could frustrate this Nation’s diplomatic objectives”); *Weixum v. Xilai*, 568 F.
22 Supp. 2d 35, 38 (D.D.C. 2008) (“defer[ring] to the Executive’s determination that
23 [Chinese] Minister [of Commerce] Bo was immune from service of process for
24 the duration of [a] special diplomatic mission” to the United States); *Greenspan*
25 *v. Crosbie*, 74 Civ. 4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) (holding

26

27

28

that an attempt to serve process on the Province of Newfoundland and Labrador by delivery of papers to immune officials was “patently improper”).

11. Deeming foreign envoys to be proper involuntary agents for service of process constitutes an assertion of jurisdiction over them. Such an assertion of jurisdiction could hinder diplomatic relations between the United States and other nations in a number of ways. Foreign envoys might be deterred from visiting this country. Foreign diplomats who enter the United States could feel pressured to sever their organizational ties or to limit their activities within this country while they are present. And independent of any such concrete effect on an envoy's behavior, a United States court's condonation of an affront to the envoy's dignity may act as an irritant in our relations with the diplomats and the government they represent. Use of foreign envoys as involuntary agents for service of process also could disrupt the conduct of the U.S. Government's foreign policy by subjecting United States diplomats to like treatment abroad. As the Second Circuit observed in *Tachiona*, "permitting service of process on foreign diplomats could be construed as a hostile act and, thus, could invite retaliatory practices in otherwise friendly countries." 386 F.3d at 224 (citing *Hellenic Lines*, 345 F.2d at 981 n.5).

12. Although the present issue also is of direct concern to Defendant Sheikh Mohamed and the UAE,³ the United States has an independent interest in

³ Article 32 of the Vienna Convention requires that waiver of immunity by the sending State “must always be express.” See also *The Abi Jaoudi & Azar Trading Corp. v. CIGNA Worldwide Ins. Co.*, 391 Fed. Appx. 173, 181, 2010 WL 3279173 (3d Cir. 2010) (noting that “there are also sensitive separation-of-powers concerns that counsel against finding waiver” of an issue concerning foreign sovereign immunity that defendant failed to raise below). Therefore, the failure of the Defendant (or the UAE) to contest service on the basis of the Vienna Convention at an earlier stage of this case cannot be construed as a waiver of the privileges and immunities afforded by the Convention.

seeking relief from a district court ruling that is inconsistent with the Vienna Convention and places this Nation in violation of its treaty obligation to respect the immunity of diplomats and to protect their inviolability. *See Tachiona*, 386 F.3d at 14 (“We conclude that the asserted adverse effects of the district court’s decision on the Government’s interests in (1) ensuring that the United States does not violate its treaty obligations, and (2) guarding its authority to set the terms upon which foreign ambassadors are received, are sufficient to confer standing on the Government to appeal the district court’s ruling upholding the service of process on Mugabe and Mudenge as agents for ZANU-PF.”). *See also Sanitary Dist. v. United States*, 266 U.S. 405, 425-26 (1925) (“[The United States] has a standing in this suit . . . to carry out its treaty obligations to a foreign power. . . .”); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232-34 (D.C. Cir. 2003) (United States has standing to seek redress from harm resulting from order causing treaty violation); *United States v. Arlington*, 669 F.2d 925, 929-30 (4th Cir.), cert. denied, 459 U.S. 801 (1982) (United States has standing to initiate action to seek relief from conduct that would cause treaty violation).

17 13. Corrective action is necessary here for the United States to fulfill its
18 international treaty responsibilities. Moreover, failure to remedy the violation of
19 the Vienna Convention in this case could seriously harm the United States'
20 foreign policy interests. *See* Ex. 1.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court vacate its Order of March 3, 2010, and invalidate the service upon Defendant Sheikh Mohamed because service upon him in the manner approved by the Court constitutes a clear violation of the Vienna Convention on Diplomatic Relations.

Dated: February 24, 2011 Respectfully submitted,

/s/ Eric J. Beane
ERIC J. BEANE
Trial Attorney, Department of Justice
Civil Division— Federal Programs Branch
20 Massachusetts Ave., N.W., Rm. 7124
Washington, D.C. 20530

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

February 24, 2011

The Honorable Tony West, Esq.
Assistant Attorney General
Civil Division
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington D.C. 20530

Re: Khaled Al Hassen v. Sheikh Khalifa bin Zayed Al Nahyan, et al.,
Case No. CV 09-01106 DMG (C.D. Cal.)

Dear Assistant Attorney General West:

I write to request that the Department of Justice convey to the United States District Court for the Central District of California in the above-referenced case the determination of the Department of State that the United Arab Emirates (UAE) diplomats on whom service was ordered and subsequently made on behalf of Defendant Sheikh Mohamed bin Zayed Al Nahyan enjoy personal inviolability and immunity from the jurisdiction of U.S. courts under the Vienna Convention on Diplomatic Relations (Vienna Convention), Apr. 18, 1961 ("VCDR"), 23 UST 3227; TIAS 7502; 500 UNTS 95, including from such service of process. The service on Sheikh Mohamed through these UAE diplomats should thus be voided.

Plaintiff Khaled Al Hassen, a naturalized American citizen, alleges that while in the UAE on business in January 1984, he was abducted, detained, and tortured. Plaintiff further claims that he was held in prison until November 1985, but was never charged with any crime. Plaintiff claims he was mistreated either by the defendants themselves or by others under their direction. The original defendants were Sheikh Khalifa bin Zayed al Nahyan (Sheikh Khalifa), the head of state of the UAE; Sheikh Mohamed bin Zayed al Nahyan (Sheikh Mohamed), the crown prince of Abu Dhabi, Chairman of the Abu Dhabi Executive Council, and Deputy Supreme Commander of the UAE Armed Forces; and General Saeed Hilal Abdullah al Darmaki (General Saeed) of the UAE Armed Forces.¹ Plaintiff seeks compensatory and punitive damages for violation of the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, and the laws of California in claims for assault and battery, false arrest and false imprisonment, and civil conspiracy.

On March 3, 2010, the Court granted Plaintiff's Motion for Service of Process by Alternative Means, stating that "... the United Arab Emirates ambassador and military attaché to the United States are appropriate individuals to accept service of process on behalf of these

¹ On September 17, 2010, the Court dismissed Plaintiff's claims against Sheikh Khalifa based on a Suggestion of Immunity by the United States. The Department takes no position on the merits of any of the Plaintiff's claims against any of the three Defendants.

defendants. Plaintiff may serve Defendants Sheikh Khalifa and Sheikh Mohamed by personally delivering or sending by certified mail a copy of the summons and complaint to either the ambassador or the military attaché.” According to the Declaration of Robert D. Goldberg, filed on June 28, 2010, Plaintiff sent copies by certified mail of the Summons and Complaint to the UAE Ambassador (Yousef Al Otaiba) and to the UAE Military Attaché (Waleed Al Shamsi) “on behalf of Defendants Sheikh Khalifa and Sheikh Mohamed.”

This was an incorrect statement of law, and the actions taken contravene the VCDR. The ambassador and the military attaché at the UAE Embassy are accredited diplomatic agents of the UAE to the United States. As such, they enjoy privileges and immunities under the Vienna Convention, including immunity from service of process. The Vienna Convention provides in Article 31(1) that a “diplomatic agent shall . . . enjoy immunity from [the receiving state’s] civil and administrative jurisdiction” (with three exceptions, inapplicable here, related to real estate, succession, or professional or commercial activities “outside his official functions”). Moreover, Article 29 provides that “[t]he person of the diplomatic agent shall be inviolable” and requires “[t]he receiving States [to] treat him with due respect and . . . take all appropriate steps to prevent any attack on his person, freedom, or dignity.”

The Court’s order regarding service, and the actual service, on the UAE ambassador and the military attaché were inconsistent with these provisions of the Vienna Convention. The Convention does not allow treating a diplomatic agent as an agent for the purpose of service of process absent evidence that the diplomat has voluntarily assumed this role. Such involuntary service constitutes an assertion of jurisdiction over the diplomatic agent, as it necessarily requires the diplomatic agent to act by delivering the summons and complaint to the Defendant. Moreover, service on these diplomatic agents is contrary to their inviolable status. *See Tachiona v. Mugabe*, 386 F.3d 205, 224 (2d Cir. 2004).

Any failure to respect the privileges and immunities accorded to diplomatic agents under the Vienna Convention, a multilateral treaty, would be contrary to the Convention and would be incompatible with the United States’ responsibilities to its treaty partners, thereby jeopardizing the protections reciprocally extended by other nations to U.S. diplomatic personnel stationed abroad. Allowing the improper service upon Sheikh Mohamed through diplomatic agents to stand would seriously impact the United States’ ability to conduct foreign relations.

Accordingly, the Department of State requests that the Department of Justice submit to the Court an appropriate filing to remedy this situation as soon as possible.

Sincerely,



Harold Hongju Koh
The Legal Adviser

CERTIFICATE OF SERVICE

On February 24, 2011, undersigned counsel for the United States sent a copy of the foregoing Statement of Interest via U.S. Mail and electronic mail to the following counsel of record:

Robert D Goldberg
Roger William Clark
Clark Goldberg and Madruga
11400 West Olympic Boulevard Suite 1150
Los Angeles, CA 90064
310-478-0077
Fax: 310-478-0099
Email: rgoldberg@cgold.cc
rclark@cgold.cc

**Nicholas James Begakis
Katherine French Murray
Thomas Peter O'Brien**
Paul Hastings Janofsky and Walker
515 S Flower Street 25th Floor
Los Angeles, CA 90071-2228
213-683-6000
Fax: 213-627-0705
Email: nicholasbegakis@paulhastings.com
katherinemurray@paulhastings.com
thomasobrien@paulhastings.com

/s/ Eric J. Beane
ERIC J. BEANE
Trial Attorney
Civil Division, Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W., Room 7124
Washington, D.C. 20530